LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 5 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1087

STATE OF NEW YORK,

Petitioner,

v.

MORTON SALT COMPANY, PIONEER SALT COMPANY, SALT SERVICE INCORPORATED, INTERNATIONAL SALT COMPANY, CAYUGA ROCK SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DAVID BERGER,
HERBERT B. NEWBERG,
H. LADDIE MONTAGUE, JR.,
HOWARD L. SCHAMBELAN,
COHEN, SHAPIRO, BERGER,
POLISHER AND COHEN,
22nd Floor,
Philadelphia Saving Fund Building,
Philadelphia, Pa. 19107
Special Counsel for Petitioner.

LOUIS J. LEFKOWITZ,
Attorney General for the State of New York,
GEORGE C. MANTZOROS,
JOEL A. WINDMAN,
Assistant Attorneys General,
Attorneys for Petitioner.

International, 711 So. 8th St., Phila., Pa. 19147—Tel. SA 7-8711 Area Code 215

TABLE OF CONTENTS OF PETITION FOR WRIT OF CERTIORARI.

	Page
Reports of the Opinion of the Court Below	1
Jurisdiction	2
Questions Presented	2
Federal Rules of Civil Procedure Involved	4
Statement of the Case	6
Basis for Federal Jurisdiction	7
Argument	8

TABLE OF CITATIONS.

Cases Cited: Page

Atlantis Development Corp. v. U. S., 379 F. 2d 818 (5th Cir. 1967) 12

Carroll v. American Federation of Musicians of the United States and Canada, 33 F. R. D. 353 (S. D. N. Y. 1963) 9

Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967) . . 2, 11, 12

City of Philadelphia v. Morton Salt Company, et al., 248 F. Supp. 506 (E. D. Pa., 1965) 6

Escott v. Barchris Construction Corp., 340 F. 2d 731 (2nd Cir. 1965), cert. den. sub nom. Drexel & Co. v. George Hall, 382 U. S. 816, 86 S. Ct. 37, 15 L. Ed. 2d 63 1965) 8, 9, 12, 13

Fowkes v. Dravo Corp., 75 F. Supp. 514 (E. D. Pa. 1946) .. 9

Hardy Salt Co. v. State of Illinois, 377 F. 2d 768 (8th Cir. 1967) 11

Hurd v. Bell Telephone Company, 234 F. 2d 942 (7th Cir. 1956) 8

Leh v. General Petroleum Corp., 382 U. S. 54, 86 S. Ct. 203, 15 L. Ed. 134 (1965), reh. den. 382 U, S. 1001, 86 S. Ct. 525, 15 L. Ed. 2d 491 10

Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Company, 381 U. S. 311, 85 S. Ct. 1473, 14 L. Ed. 2d 405 (1965) 10

Morton Salt Company v. United States, 382 U. S. 44, 86 S. Ct. 181, 15 L. Ed. 2d 36 (1965) 7

Newberg v. American Dryer, 195 F. Supp. 345 (E. D. Pa. Pa. 1961) 13

New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Company, 332 F. 2d 346, 359 (3rd Cir. 1964) 11

Pentland v. Dravo Corp., 152 F. 2d 851 (3rd Cir. 1945) 9

State of Michigan v. Morton Salt Co., 259 F. Supp. 35 (D. Minn. 4th Div. 1966) 11

TABLE OF CITATIONS (Continued).

Cases Cited (Continued):

	Page
State of New Jersey v. Morton Salt Co., et al., — F. 2d — 1967 Trade Cases ¶ 72,300 (3rd Cir. 1967)	11
State Wholesale Grocers v. Great Atlantic and Pacific Tea Company, 24 F. R. D. 510 (N. D. Ill. 1959)	9
Union Carbide and Carbon Corporation v. Nisley, 300 F. 2d 561 (10th Cir. 1962), appeal dismissed sub nom. Wade v. Union Carbide and Carbon Corporation, 371 U. S. 801, 83 S. Ct. 13, 9 L. Ed. 2d 46 (1963)	8, 12, 13
U. S. v. First National Bank & Trust Co. of Lexington, — F. Supp. —, 1967 Trade Cases, ¶ 72,332 (E. D. Ky. 12-29-67)	12
York v. Guaranty Trust Co. of N. Y., 143 F. 2d 503 (2nd Cir. 1944), reversed on other grounds 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)	8, 12

Statutes Cited:

Clayton Act, Section 4, Oct. 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15	7
Clayton Act, Section 5B, 15 U. S. C. 16(b)	2
United States Code, Title 28. Section 1254	2

Rules Cited:

FRCP 23(a)(3)	3, 4, 5, 6, 8, 12
FRCP 24 as amended	3, 8
FRCP 24(a) as amended	4
FRCP 24(b) as amended	4
FRCP 24(a)(2) as amended	2

Miscellaneous:

Senate Report on the 1955 amendment to Section 5(b) of the Clayton Act	11

INDEX TO PETITIONER'S APPENDIX.

	Page
Opinion of the Court of Appeals	1a
Excerpts From the Record	5a
Complaint	5a
Order Granting Motion to Amend the Complaint and Granting Motions to Intervene	12a
Amended Complaint	17a
Exhibit A to Amended Complaint	29a
Certificate of Service	32a
Order of Court That "Class" Will Be Closed 6/1/66	34a
Pre-Trial Order	35a
Depositions	40a
Motion of the New York State Thruway Authority for Leave to Intervene as a Party Plaintiff	43a
Exhibit 1 to Motion—Complaint of Intervenor Plaintiff, New York State Thruway Authority	45a
Order of May 31, 1966	48a
Form of Order	49a
Motion of the State of New York for Leave to Intervene as Party Plaintiff	50a
Exhibit 1 to Motion to Intervene	52a
Objections of Defendants Cayuga Rock Salt Co., et al. to Motion of the State of New York for Leave to Intervene as Party Plaintiff	57a
Exhibit A to Objections	63a
Exhibit B to Objections	64a
Order of Court Denying Motion to Intervene Filed by the State of New York, Dated 6/14/66; and That the Class for All Purposes in This Case Is Closed as of 6/1/66	65a
Notice of Appeal	66a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

STATE OF NEW YORK,

Petitioner,

v.

MORTON SALT COMPANY, PIONEER SALT COMPANY, SALT SERVICE INCORPORATED, INTERNATIONAL SALT COMPANY, CAYUGA ROCK SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

THE STATE OF NEW YORK PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN THE ABOVE ENTITLED CASES FILED NOVEMBER 6, 1967.

REPORTS OF THE OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 385 F. 2d 122 (3rd Cir. 1967) and 1967 Trade Cases, ¶ 72,266. It is appended to this Petition, pages 1a-4a.

JURISDICTION.

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit affirming the Order of the United States District Court for the Eastern District of Pennsylvania were filed on November 6, 1967.

The jurisdiction of this Court is based on Section 1254, Title 28, United States Code, providing for appeal from cases in the courts of appeals "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree, ..."

QUESTIONS PRESENTED.

1. Does the decision of the Third Circuit, which assumes the existence of all prerequisites for intervention of right by Petitioner under F. R. C. P. 24(a)(2) as amended, but denies such intervention solely on the unsupported ground that the application therefor was untimely, run counter to the decision of this Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967), since such application was filed:

(a) prior to the completion of interrogatory, documentary or deposition discovery by either side;

(b) prior to the expiration of the applicable statute of limitations period (Clayton Act, Section 5B, 15 U. S. C. 16(b)); and

(c) prior to a firm trial date being set or any major settlements being consummated?

2. In a private antitrust action in which a national class of state and local governmental bodies was held valid under

former F. R. C. P. 23(a)(3), has Petitioner, People of the State of New York, been deprived of its right to obtain the benefits of the class action by reason of the District Court Order dated February 6, 1967 which denied Petitioner's application for intervention under F. R. C. P. 24, as amended, solely on the ground that its application was untimely, when at the time it was filed:

(a) the applicable statute of limitations period had not yet expired, whereas the order denying intervention was handed down after the expiration of such period;

(b) there existed a prior order closing the class which order Petitioner could not challenge until it moved to intervene;

(c) the reasons upon which such class-closing order was based (namely, that all discovery would be completed by the closing date and that there would be adherence to an established trial schedule commencing shortly thereafter) were incapable of fulfillment as of the date the class was purportedly closed;

(d) Petitioner received no notice, actual or constructive, of the closing of the class; and

(e) no firm trial date had been set nor any major settlements consummated?

3. Is the decision of the Third Circuit denying intervention under such circumstances in conflict with decisions in the Second, Seventh and Tenth Circuits where interventions in class actions were held timely up to the time of trial and even after judgment and even where the statute of limitations period had already expired?

4. When a court purports to close a valid class action under former F. R. C. P. 23(a)(3) and no notice of that closing is given to Petitioner or to New York State Thruway Authority, members of that class, may knowledge of such closing be constructively charged against an out-of-state petitioner, People of the State of New York, so as to deny intervention solely on the circumstance that the Attorney General of the State of New York appeared as formal counsel of record for the Authority which moved to intervene one day prior to the closing date?

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

Federal Rule of Civil Procedure 24(a), (b) as amended:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon

any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. (As amended Dec. 27, 1946, eff. March 19, 1948.)"

Federal Rule of Civil Procedure 23(a)(3) prior to July 1, 1966 amendment:

"(a) If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is . . .

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

STATEMENT OF THE CASE.

Petitioner, People of the State of New York, seeks intervention in an antitrust action commenced on July 1, 1963 by the City of Philadelphia in behalf of itself and all other state and local governments, governmental agencies and governmental subdivisions similarly situated, against the major national producers of rock salt and certain distributors (Appendix, 5a, 6a). On May 12, 1965, the District Court granted intervention petitions of 59 states and municipal governments (Appendix, 12a-15a). Thereafter several other governmental bodies were permitted intervention. On November 10, 1965, the District Court held the class action to be valid under former F. R. C. P. 23(a)(3). *City of Philadelphia v. Morton Salt Company, et al.*, 248 F. Supp. 506 (E. D. Pa., 1965).

On December 7, 1965, the District Court further ruled that all pre-trial discovery must be completed by June 1, 1966, that the class will be closed on that date and that no additional plaintiffs would be permitted to intervene thereafter (Appendix, 34a). Nowhere in the record of the District Court or of the Court of Appeals is it established, explicitly or implicitly, that Petitioner had any knowledge whatsoever of the Order closing the class.

Petitioner filed its application for intervention on June 14, 1966. At that time, discovery had not been completed,[1] there was no pre-trial delineation of issues and no trial date had been scheduled. A settlement with one minor defendant[2] had been made; no other settlements were consum-

1. At this moment, discovery still has not been completed. Plaintiffs have at least six additional depositions to take, and defendants have yet to take any depositions. Supplemental Interrogatories and a Supplemental Motion for Production of Documents filed by Plaintiffs have not yet been responded to by Defendants.

2. Cargill, Incorporated.

mated.[3] Petitioner filed its motion to intervene within one year of the termination of a similar government civil action against, inter alia, Morton, Diamond and International, *Morton Salt Company v. United States,* 382 U. S. 44, 86 S. Ct. 181, 15 L. Ed. 2d 36 (1965).[4] Prior to that, these same defendants were acquitted in a related criminal action (June 7, 1962).

On February 1, 1967, the District Court, without filing an Opinion, denied Petitioner's application to intervene and ordered the class closed as of June 1, 1966 (Appendix, 65a). The Court of Appeals, in a per curiam Opinion, affirmed, solely on the basis that the District Court's denial of permissive intervention was not an abuse of discretion, and assuming that Petitioner had a right to intervene, its application was untimely. It is from the Judgment and Opinion of the Third Circuit that a Petition for Writ of Certiorari is sought.

BASIS FOR FEDERAL JURISDICTION.

Federal jurisdiction is based upon the Clayton Act, Section 4, Oct. 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15.

---

3. Defendants, Morton Salt Company and Diamond Crystal Salt Company, have settled with some, but not all, of plaintiffs. Defendant, International Salt Company, subsequent to the filing of Petitioner's intervention motion, settled with all plaintiffs except the City of Baltimore, and the City of Baltimore's claim was severed from the class action and preserved in a new action. Because International settled with plaintiffs after Petitioner's motion to intervene was filed, International must still be considered a defendant in the class action *vis-a-vis* Petitioner.

4. International entered into a consent decree on November 4, 1963, to be effective January 4, 1964. The United States Supreme Court affirmed the judgment against Morton and Diamond on October 26, 1965.

ARGUMENT.

1. Where no notice of any closing of the class was given to its members, including Petitioner, intervention in a class action, either permissive or of right, under F. R. C. P. 24, as amended, is timely, when the application is filed, as here, prior to substantial completion of discovery, prior to a pretrial delineation of issues, prior to the setting of a trial date, prior to any major settlements and prior to the running of the applicable statute of limitations.

Rule 24 requires, *inter alia,* "timely application" in order for either permissive intervention or intervention of right to be granted. Neither the Rule itself nor the Comments of the Advisory Committee suggest any guidelines as to what constitutes timely or untimely intervention. Denial of Petitioner's application for intervention into a valid class action, of which it is a member, under former F. R. C. P. 23(a)(3), under the circumstances of this case, is an arbitrary departure from the standards of intervention heretofore judicially established and unduly limits the rights of Petitioner who otherwise qualifies for intervention.

In *Union Carbide and Carbon Corporation v. Nisley,* 300 F. 2d 561 (10th Cir. 1962), appeal dismissed sub nom. *Wade v. Union Carbide and Carbon Corporation,* 371 U. S. 801 (1963), a private antitrust action, the Court of Appeals for the Tenth Circuit allowed parties plaintiff to intervene in a spurious class action after trial but before final judgments were entered. Other circuits have upheld interventions in spurious class actions after trial: *Hurd v. Bell Telephone Company,* 234 F. 2d 942 (7th Cir. 1956); *York v. Guaranty Trust Co. of N. Y.,* 143 F. 2d 503 (2nd Cir. 1944), reversed on other grounds 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945); and *Escott v. Barchris Construction Corp.,* 340 F. 2d 731 (2nd Cir. 1965), cert. den. sub

nom. *Drexel & Co. v. George Hall*, 382 U. S. 816, 86 S. Ct. 37, 15 L. Ed. 2d 63 (1965).

In *Carroll v. American Federation of Musicians of the United States and Canada*, 33 F. R. D. 353 (S. D. N. Y. 1963), the Court allowed intervention on the eve of trial in a spurious class action alleging violations of the federal antitrust laws. The test applied to intervention by the Court was ". . . 'whether the intervention will *unduly delay or prejudice the adjudication of the rights* of the original parties.' " 33 F. R. D. at 354. [Emphasis added.] In that case, intervention was granted even though the intervenor: (1) knew of the litigation for a long period; (2) was to be a principal witness for the plaintiffs; and (3) was a plaintiff in a companion suit.

In *State Wholesale Grocers v. Great Atlantic and Pacific Tea Company*, 24 F. R. D. 510 (N. D. Ill. 1959) a private antitrust spurious class action, the Court allowed interventions of party plaintiffs 3½ years after the original action was commenced and 2½ years after the proofs had been closed on the issue of liability.

The instant decision of the Third Circuit is even contrary to that Court's earlier rulings in *Pentland v. Dravo Corp.*, 152 F. 2d 851 (3rd Cir. 1945) where the Court reversed an Order of the District Court which had granted, at the pre-trial stage, defendant's motion for judgment against plaintiff as a representative of a class. The Circuit Court held that it was premature to preclude potential plaintiffs from intervening in a spurious class action at the pre-trial stage. Following that decision, the District Court held in *Fowkes v. Dravo Corp.*, 75 F. Supp. 514 (E. D. Pa. 1946):

> *"It is submitted that the greatest justice is best accomplished in cases such as this to allow the fullest period of time for those employees who desire to have*

the benefit of the court's decree to come into the proceedings."

". . . the opinion of this court, dated August 13, 1945 is amended so that *the case shall remain open for all parties and intervenors until time of final judgment when the court shall determine whether the judgment shall be binding only on those who have joined or whether to allow others similarly situated to be brought in by appropriate supplementary proceedings."* [Emphasis supplied.]

Thus the decision of the Third Circuit is in substantial conflict with decisions of other circuits and its own former decision allowing interventions in similar classes.

This Court has stressed the importance of private antitrust litigation in supplementing enforcement of the antitrust laws. *Leh v. General Petroleum Corp.*, 382 U. S. 54, 86 S. Ct. 203, 15 L. Ed. 134 (1965), reh. den. 382 U. S. 1001, 86 S. Ct. 525, 15 L. Ed. 2d 491; *Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Company*, 381 U. S. 311, 85 S. Ct. 1473, 14 L. Ed. 2d 405 (1965).

"Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.

. . . The broad aim of this enactment was to use 'private self-interest as a means of enforcement' of the antitrust laws." 381 U. S. at 318, 85 S. Ct. at 1477, 14 L. Ed. 2d at 411.

The Congressional policies emphasized in this Court's opinions in *Leh*, and in *Minnesota Mining* require the allowance of Petitioner's motion to intervene in the present action, there being no other prevailing contrary considerations involved. Moreover, this Court emphasized the necessity of allowing private litigants enough time after com-

pletion of a governmental proceeding to assess intelligently the government's case and evidence before deciding upon what course of action that private litigant will take. Quoting from the Senate Report on the 1955 amendment to Section 5(b) of the Clayton Act, the Third Circuit stated:

> "'Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint,' Senate Report No. 619, June 21, 1955, U. S. Code Cong. and Ad. News, 84 Cong. 1st Sess. P. 2332." *New Jersey Food Finishing Co. v. Minnesota Mining and Manufacturing Company*, 332 F. 2d 346, 359 (3rd Cir. 1964).

Where, as here, there will be no delay to the proceedings and no prejudice to any party involved if the intervention is allowed, and where the application is made within the time period provided by Congress for bringing the particular action,[5] a denial of intervention is not only contrary to the dictates of Congress, but contravenes also Federal Rule Civil Procedure 1 in that the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action."

In so narrowly construing F. R. C. P. 24, as amended, the Third Circuit's decision runs counter to the holding in *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*, 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967) and contravenes the policy and spirit of the underlying

5. See *State of New Jersey v. Morton Salt Co., et al.* — F. 2d — 1967 Trade Cases ¶ 72,300 (3rd Cir. 1967); *Hardy Salt Company v. State of Illinois*, 377 F. 2d 768 (8th Cir. 1967); *State of Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 4th Div. 1966).

principles of the *Leh* and *Minnesota Mining* decisions. See also *Atlantis Development Corp. v. U. S.*, 379 F. 2d 818 (5th Cir. 1967) and *U. S. v. First National Bank and Trust Co. of Lexington*, — F. Supp. —, 1967 Trade cases, ¶ 72,332 (E. D. Ky. 12-29-67) where the Court liberally construes and upholds the dictates of *Cascade, supra.*

2. When a class action under former F. R. C. P. 23(a)(3) has been held valid and the class is ordered closed at a later time, a member of that class who was aware of its existence but who received no notice, express or constructive of the closing, is unjustly disenfranchised of his rights to participate in the benefits of that class action. Otherwise, the class action device under former Rule 23 becomes a trap, in that members of the class who have knowledge that the action is pending, in most instances by publication of the opinion upholding the class,[6] are lulled into believing their rights are being protected and prosecuted.

The cases of *Escott v. Barchris Construction Corp., supra; Union Carbide and Carbon Corp. v. Nisley, supra,* and *York v. Guaranty Trust Co. of N. Y., supra,* all of which held that the applicable statute of limitations is tolled for all members of a class by the commencement of a spurious class action, recognize the danger of such a class action becoming a "trap" for unwary members of that class. In *York,* the Second Circuit held:

> "Any non-accepting note holders, relying on that assurance, were justified in believing that plaintiff's suit was begun on their behalf although they were not

6. In the instant case, the District Court's opinion upholding the class action was reported or publicized in at least the following sources: 248 F. Supp. 506 (E. D. Pa. 1965); 1965 CCH Trade Cases, ¶ 71,614; 9 F. R. Serv. 2d 23 a. 33, Case 4: 227 BNA Antitrust and Trade Regulation Report, p. A-10 (1965). In contrast, the class-closing order was not so reported or publicized.

before the Court. *To hold that such noteholders cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff, would be to convert the Rule [23(a)(3)] into a trap . . .* Those who do intervene will be no more barred by lapse of time than is the plaintiff, unless defendant can prove special facts affecting them." 143 F. 2d at 529. (Emphasis added.)

And in *Union Carbide, supra,* 300 F. 2d at p. 590, the Tenth Circuit, ruling in an antitrust action, cogently held:

"If a [spurious] class action is maintainable as such, it is incongruous to say that the absent members, who are represented by those present, may not rely upon the commencement of the action by their brethren to toll the running of the statute (of limitations). *This would only serve to convert the Rule [23] into a trap for those who have expeditiously allowed their rights to be maintained as a class action.*" (Emphasis added.)

In *Escott, supra,* 340 F. 2d at 733, the Second Circuit stated that "If we are to give recognition to the representative character of the action we must hold that the statute of limitations is tolled for those in whose behalf the representative action is brought as well as who actually bring the action." Accord: *Newberg v. American Dryer,* 195 F. Supp. 345 (E. D. Pa. 1961). In the case sub judice, the denial of Petitioner's intervention was not directed by the Court until long after the statute of limitations period had expired.[7] Petitioner, a member of the class, should

7. While it is true that Petitioner, as a prudent matter, did commence an independent antitrust action against rock salt suppliers within the statute of limitations period (*State of New York v. Morton Salt Co., et al.,* Civil Action No. 40919, E. D. Pa., commenced

not be unwaringly "trapped" from receiving the benefits of the class action by an Order of the District Court closing the class, of which Order it had no notice.

The Court below not only charged Petitioner with knowledge of the pendency of the class action, but also with constructive knowledge of the closing date of the class. This latter imputation of knowledge of the closing date is unsupported by the record and is contrary to fact. The Court below imputed this knowledge to Petitioner solely on the ground that Petitioner's "attorney general's name appeared on a timely intervention in this action by the New York Thruway Authority." (Appendix, 4a). New York State has thus been barred from participating in the class action by a remote imputation of knowledge by an appellate court which in turn was based on an unsupported assumption that intervenor New York State Thruway Authority knew of the purported closing date for the class when it filed for intervention on May 31, 1966. Clearly, logic and reason dictate that knowledge of a closing date cannot be imputed from this fact for there is not even a suggestion that the Attorney General of Petitioner may have known of or had reason to know of the closing date when the Thruway Authority's application for intervention was filed. In light of the foregoing, existence or nonexistence of such knowledge is irrelevant to the determination of timeliness. To any extent that such knowledge is deemed to be relevant, discovery should be taken on this point, so that facts, rather than an illogical supposition, can be established. Otherwise, Petitioner, the People of the

August 10, 1966), the Petitioner has been relying mainly on the prosecution of its claims in the principal class action in which Petitioner sought formal leave to intervene. The bringing of this independent action is irrelevant to the issues involved in this petition for certiorari and certainly Petitioner should not be penalized for its prudence and deprived of its rightful benefits as a member of the class action by virtue of its collateral proceeding.

State of New York, may be deprived of its substantial claim against violators of the antitrust laws by resort to an inference without support in fact or reason, and in any event, will lose the beneficial effects of the class action against those violators.

Respectfully submitted,

DAVID BERGER,
HERBERT B. NEWBERG,
H. LADDIE MONTAGUE, JR.,
HOWARD L. SCHAMBELAN,
COHEN, SHAPIRO, BERGER,
POLISHER AND COHEN,
22nd Floor, Philadelphia Saving
Fund Bldg.,
Philadelphia, Pa. 19107
Special Counsel for Petitioner,

LOUIS J. LEFKOWITZ,
Attorney General for the State of
New York,

GEORGE C. MANTZOROS,
JOEL A. WINDMAN,
Assistant Attorneys General,
Attorneys for Petitioner.